Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Message Text

PAGE 01 STATE 107803
ORIGIN OPIC-06

INFO OCT-01 ARA-10 ISO-00 EB-07 L-03 TRSE-00 /027 R

DRAFTED BY OPIC/GC;R STERN
APPROVED BY EB/IFD/ OIA:R ' SMITH
EB/IFD/OIA;D H STEBBING
L/EB:SBOND
ARA/ECP:SROGERS
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P 120144Z MAY 77
FM SECSTATE WASHDC
TO AMEMBASSY KINGSTON PRIORITY

UNCLAS STATE 107803

E.O. 11652: N/A

TAGS: EINV

SUBJECT: REVERE MATTER

1. OPIC REQUESTS THAT THE TEXTS OF THE FOLLOWING LETTERS BE COMMUNICATED IMMEDIATELY TO THE ADDRESSEES. LETTERS WILL FOLLOW BY REGULAR MAIL:

A. QUOTE. MAY 9, 1977
THE HONORABLE
SENATOR DUDLEY THOMPSON
MINISTER OF MINING AND NATURAL RESOURCES
2 ST. LUCIA AVENUE
KINGSTON 5
JAMAICA

DEAR MINISTER THOMPSON:

UNCLASSIFIED

PAGE 02 STATE 107803

THANK YOU VERY MUCH FOR YOUR LETTER OF MAY 4 SO PROMPTLY REPLYING TO MY LETTER OF THE SAME DATE. I BELIEVE WE NOW FULLY UNDERSTAND YOUR GOVERNMENT'S VIEWS OF THE REVERE DISPUTE AND THEIR RELATION TO THE DISPOSITION OF THE REVERE PLANT.

IN THE LAST PARAGRAPH OF THE FIRST PAGE OF YOUR LETTER YOU

STATED THAT OPIC AND THE GOVERNMENT OF JAMAICA MUST ESTABLISH NON-LIABILITY TO REVERE PRIOR TO ARRIVING AT AN ARR-

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

ANGEMENT FOR RESTORING INVESTMENT IN THE REVERE FACILITIES AND RECOMMENCING PLANT OPERATIONS. THIS YOU SAY IS NECESSARY TO AVOID WRONGFULLY INVESTING FUNDS OF UNITED STATES TAXPAYERS TO EFFECT A COMPROMISE WHERE THERE IS NO LIABILITY.

WE SUGGEST TO YOU THAT THIS APPROACH IS NOT IN THE BEST INTERESTS OF EITHER YOUR GOVERNMENT OR OPIC. REGARDLESS OF THE OUTCOME OF REVERE'S LITIGATION WITH EITHER YOUR GOVERNMENT OR WITH OPIC, WE BELIEVE IT IS TO THE ADVANTAGE OF THE GOVERNMENT OF JAMAICA TO PROCEED AS RAPIDLY AS POSSIBLE TO RESTORE THE ASSET TO OPERATION. FURTHER DELAY COULD PERMIT DETERIORATION OF PHYSICAL ASSETS AND CONSTRUCTION COSTS ARE, OF COURSE, CONSTANTLY RISING. MOREOVER, THE LOSS TO JAMAICA OF EMPLOYMENT AND FOREIGN EXCHANGE ENTAILED IN A DELAY WOULD BE REGRETTABLE. FROM OPIC'S STANDPOINT, THERE IS VALUE IN PROCEEDING APACE IN ORDER TO MAXIMIZE SALVAGE SHOULD WE LOSE AN ARBITRATION WITH REVERE OR, WITHOUT TAKING A POSITION ON THE MERITS OF THE CLAIM, SETTLE THE CASE. ACCORDINGLY, WE URGE THAT THE GOVERNMENT OF JAMAICA AND OPIC COOPERATE TO EXPEDITE THE ESTABLISHMENT OF THE BASES FOR A VIABLE PROJECT ON THE FOUNDATION OF THE EXISTING REVERE FACILITIES.

EXAMINATION OF A NEW PROJECT CAN GO FORWARD WITHOUT PREJUDICE TO THE LEGAL MERITS OF JAMAICA'S OR OPIC'S POSITION
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WITH RESPECT TO REVERE'S CLAIMS. CERTAINLY, THE PROJECT DESIGNED WOULD NOT PLACE A VALUE ON THE PRESENT REVERE FACILITIES WHICH WOULD INCLUDE AN ELEMENT ATTRIBUTABLE TO REVERE'S CLAIM AGAINST OPIC.

WE BELIEVE AN INDEPENDENT FEASIBILITY STUDY, UNDERTAKEN IN PHASES, TO BE AN ESSENTIAL FIRST STEP. I REPEAT OUR OFFER TO FINANCE SUCH A STUDY WITH THE EXPENDITURE TO BE CAPITALIZED IN THE NEW VENTURE.

AS I INDICATED IN OUR MEETING OF MAY 3, OPIC MAY BE FORCED TO CONCLUDE THAT A NEGOTIATED SETTLEMENT OF REVERE'S U.S. DOLLARS 80 MILLION CLAIM IS THE PREFERABLE WAY TO PROCEED IN THIS MATTER. RICHARD STERN MET WITH DR. RATTRAY TO FULLY EXPLAIN REVERE'S ALLEGATIONS AND THEORIES AND TO OBTAIN THE SOLICITOR GENERAL'S GENEROUS ASSISTANCE. I AM ENCLOSING A FOLLOW-UP LETTER TO DR. RATTRAY FROM MR. STERN, SETTING FORTH REVERE'S KEY POINTS. I BELIEVE IT IS READILY APPARENT THAT THE ITEMS WHICH YOU HAVE ENUMERATED ON PAGE TWO OF YOUR MAY 4 LETTER CONTRAVERTING REVERE'S CLAIM AGAINST OPIC ARE NOT DISPOSITIVE, UNDER REVERE'S

THEORY, EVEN IF THEY COULD ALL BE PROVEN CONCLUSIVELY TO THE SATISFACTION OF THE ARBITRATORS. IT IS INDEED QUITE

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

POSSIBLE THAT REVERE COULD LOSE ITS CASE IN JAMAICA COURTS AND WIN ITS ARBITRATION AGAINST OPIC.

ANOTHER POINT CONCERNING SETTLEMENT BETWEEN OPIC AND REVERE IS IMPORTANT TO NOTE. SHOULD OPIC LITIGATE THE CLAIM AND LOSE, OPIC WOULD SUCCEED ONLY TO REVERE'S EQUITY INTEREST IN REVERE JAMAICA ALUMINA LTD. ("RJA"). THERE IS APPROXIMATELY US DOLLARS 27 MILLION IN OUTSTANDING DEBT RUNNING FROM RJA TO REVERE WHICH WOULD NOT BE AFFECTED BY THE JUDGMENT. THUS, REVERE WOULD RETAIN A SUBSTANTIAL CREDITOR INTEREST IN THE COMPANY WHICH WOULD GREATLY BURDEN ANY NEW PROJECT.
UNCLASSIFIED

PAGE 04 STATE 107803

OBVIOUSLY, THE CONSEQUENCES OF LOSING THE ARBITRATION WOULD BE HIGHLY DELETERIOUS TO THE PROSPECT OF RETURNING THE ASSET TO OPERATION. THESE PROSPECTIVE CONSEQUENCES HAVE BEEN AMONG THE FACTORS WHICH HAVE CAUSED US TO SERIOUSLY CONSIDER SETTLEMENT OF THE CASE. OF COURSE, ANY SUCH SETTLEMENT WOULD NOT ENTAIL ADMISSION OF LIABILITY AND COULD ALSO INCLUDE WITHDRAWAL OF REVERE'S CLAIM AGAINST JAMAICA REGARDLESS OF THE STAGE OF PROCEEDINGS.

WE REQUEST YOUR COOPERATION IN AN EFFORT TO MOVE FORWARD WITH ALL DUE SPEED IN A CONCERTED EFFORT TO RESTORE THIS WASTING ASSET TO PRODUCTIVITY. SPECIFICALLY, WE URGE YOUR AGREEMENT TO JOIN US IN IDENTIFYING A FIRM TO PERFORM A FEASIBILITY STUDY AND IN LOCATING POSSIBLE LONG-TERM OUTPUT PURCHASERS AND SOURCES OF FINANCING.

I AM PREPARED TO RETURN TO JAMAICA IMMEDIATELY IF YOU BELIEVE FURTHER CONVERSATIONS WILL ADVANCE OUR MUTUAL INTEREST.

SINCERELY YOURS,
MARSHALL T. MAYS
SPECIAL CONSULTANT
OVERSEAS PRIVATE INVESTMENT CORPORATION

ENCLOSURE

CC: HONORABLE ALFRED A RATTRAY,
AMBASSADOR TO THE UNITED STATES

JOHN DORRANCE, CHARGE
U.S. EMBASSY. UNQUOTE

B. QUOTE. MAY 9, 1977

UNCLASSIFIED

PAGE 05 STATE 107803

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

DR. KENNETH RATTRAY
SOLICITOR GENERAL
PUBLIC BUILDINGS EAST
KINGSTON, JAMAICA

DEAR DR. RATTRAY:

I WISH TO THANK YOU AGAIN FOR GRACIOUSLY AFFORDING ME SO MUCH OF YOUR TIME LAST WEDNESDAY TO DISCUSS THE REVERE MATTER. WE ARE MAKING USE OF THE MATERIAL WHICH YOU SUPPLIED AND ARE EAGERLY AWAITING THE REMAINING INFORMATION WHICH YOU SO KINDLY OFFERED TO FURNISH.

TO FACILITATE OUR DISCUSSIONS, I ATTEMPTED TO PROVIDE YOU AS FULL AN EXPLANATION AS POSSIBLE OF THE MATERIAL ALLEGATIONS MADE BY REVERE AND THE THEORIES WHICH REVERE IS PURSUING IN ITS CLAIM AGAINST OPIC. I BELIEVE IT WOULD BE HELPFUL TO SUMMARIZE THE KEY POINTS AGAIN.

AS I STATED ON WEDNESDAY, OPIC'S INSURANCE CONTRACT PROTECTS AGAINST MORE THAN THE STANDARD FORMS OF "NATIONALIZATION", "EXPROPRIATION" AND "TAKINGS" OF ASSETS. THE CONTRACT PROVIDES COMPENSATION FOR ECONOMIC INJURY ILLEGALLY INFLICTED BY A HOST GOVERNMENT WHETHER OR NOT THE GOVERNMENT DIRECTLY BENEFITS FROM ITS ACTIONS OR PARTICIPATES IN THE INVESTED ASSETS. SPECIFICALLY, REVERE HAS MADE ITS CLAIM UNDER THE FOLLOWING PORTIONS OF THE DEFINITION OF "EXPROPRIATORY ACTION" CONTAINED IN OUR STANDARD FORM CONTRACT:

"1.15. EXPROPRIATORY ACTION. THE TERM 'EXPROPRIATORY ACTION' MEANS ANY ACTION WHICH IS TAKEN, AUTHORIZED, RATIFIED OR CONDONED BY THE GOVERNMENT OF THE PROJECT COUNTRY, COMMENCING DURING THE GUARANTY PERIOD, WITH OR WITHOUT COMPENSATION THEREFOR, AND WHICH FOR A PERIOD OF ONE YEAR DIRECTLY RESULTS IN PREVENTING:
UNCLASSIFIED

PAGE 06 STATE 107803

(B) THE INVESTOR FROM EFFECTIVELY EXERCISING ITS FUNDAMENTAL RIGHTS WITH RESPECT TO THE FOREIGN ENTERPRISE EITHER AS SHAREHOLDER OR AS CREDITOR, AS THE CASE MAY BE, ACQUIRED AS A RESULT OF THE INVESTMENT; PROVIDED, HOWEVER, THAT RIGHTS ACQUIRED SOLELY AS A RESULT OF ANY UNDERTAKING OR AGREEMENT WITH THE GOVERNMENT OF THE PROJECT COUNTRY SHALL NOT BE CONSIDERED FUNDAMENTAL RIGHTS MERELY BECAUSE THEY ARE ACQUIRED FROM SUCH UNDERTAKING OR AGREEMENT; OR

(C) THE INVESTOR FROM DISPOSING OF THE SECURITIES OR ANY RIGHTS ACCRUING THEREFROM; OR

(D) THE FOREIGN ENTERPRISE FROM EXERCISING EFFECTIVE CON-

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

TROL OVER THE USE OR DISPOSITION OF A SUBSTANTIAL PORTION OF ITS PROPERTY OR FROM CONSTRUCTING THE PROJECT OR OPERATING THE SAME; OR

OF COURSE, APPROPRIATELY COMPENSATED HOST GOVERNMENT ACTIONS AND ACTIONS WITHIN APPLICABLE DOMESTIC AND INTERNATIONAL LAW WOULD NOT BE COMPENSABLE UNDER THE CONTRACT.

ALTHOUGH REVERE'S COMPLAINT DOES NOT SET FORTH WITH LEGAL PRECISION THE APPLICATION OF CONTRACT PROVISIONS TO THE FACTS INVOLVED, THE THEORIES WITH WHICH OPIC WILL BE CONFRONTED IN ARBITRATION ARE MADE FAIRLY CLEAR. REVERE LISTS A SERIES OF ALLEGED GRIEVANCES AGAINST THE GOVERNMENT OF JAMAICA WHICH ARE INTENDED TO HAVE A CUMULATIVE EFFECT ON THE MINDS OF THE ARBITRATORS.

REVERE COMPLAINS OF THE FOLLOWING GOVERNMENT ACTIONS:

1. ENACTMENT OF THE BAUXITE LEVY IN CONTRAVENTION OF THE CONCESSION AGREEMENT.

2. APPLICATION OF THE BAUXITE LEVY ON THE BASIS OF A UNCLASSIFIED

PAGE 07 STATE 107803

DEEMED MINIMUM TONNAGE REGARDLESS OF ACTUAL PRODUCTION. (THIS IS SAID TO EFFECTIVELY IMPOSE A REQUIREMENT GOING BEYOND THE PREVIOUS REQUIREMENTS IN JAMAICAN LAW FOR "PERMANENT AND SUBSTANTIAL" MINING OPERATIONS IMPOSED AS A CONDITION FOR HOLDING A LEASE).

3. THE PROVISION IN THE BAUXITE LEVY WITHDRAWING LEGAL REDRESS FOR VIOLATION OF ITS CONCESSION AGREEMENT.

4. FAILURE OF THE GOVERNMENT TO GRANT LEVY RELIEF TO REVERE SUBSEQUENT TO THE SHUT DOWN.

5. FAILURE OF THE GOVERNMENT TO AFFIRM REVERE'S RIGHT TO SHUTDOWN FOR MORE THAN SIX MONTHS WITHOUT LOSING ITS LEASE.

6. THE GOVERNMENT'S INSISTENCE UPON ACQUIRING PARTICIPATION IN THE BAUXITE AND ALUMINA OPERATIONS OF THE ALUMINUM COMPANIES PRESENT IN JAMAICA "DESPITE ITS INABILITY TO PAY PROMPT AND ADEQUATE COMPENSATION THEREFOR."

7. THE GOVERNMENT'S UNILATERAL WITHDRAWAL OF INVESTMENT DISPUTES RELATING TO MINERALS FROM THE JURISDICTION OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES.

IN ADDITION TO MORE DIRECT ARGUMENTS, REVERE RELIES ON A CHILLED INVESTMENT CLIMATE THEORY. REVERE CONTENDS THAT

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

ALL OF THE ABOVE ACTS OF THE GOVERNMENT OF JAMAICA - BUT PARTICULARLY (1) FAILURE TO GRANT RELIEF FROM THE PRODUCTION LEVY IN SPITE OF THE FACT THAT REVERE WAS FINANCIALLY COMPELLED TO SHUT DOWN OPERATIONS, AND (2) FAILURE OF THE GOVERNMENT OF JAMAICA TO AFFIRM THE RIGHT TO SHUT DOWN FOR MORE THAN 6 MONTHS, THEREBY PLACING A SERIOUS CLOUD ON REVERE'S LEASE RIGHTS - CHILLED THE INVESTMENT CLIMATE MAKING IT IMPOSSIBLE FOR REVERE TO EXPAND THE FACILITY TO
UNCLASSIFIED

PAGE 08 STATE 107803

A FINANCIALLY VIABLE OPERATION. IN SUPPORT OF THIS THEORY, REVERE ASSERTS THAT THE GOVERNMENT OF JAMAICA WAS ACTIVELY SEEKING TO PLACE ECONOMIC PRESSURE ON REVERE IN ORDER TO COMPEL IT TO SELL THE PLANT AT AN UNREASONABLY LOW PRICE. ALONG THESE LINES, REVERE HAS ALLEGED THAT MR. ROUSSEAU, CHARGED WITH THE DUTY OF PURCHASING PARTICIPATION IN BAUXITE-ALUMINA OPERATIONS, HAS EXERCISED HIS INFLUENCE ON THE MINISTER OF FINANCE AND THE MINISTER OF MINING AND NATURAL RESOURCES TO WITHHOLD DISCRETIONARY RELIEF TO WHICH REVERE WOULD ORDINARILY BE ENTITLED. REVERE WILL ALSO CITE THE FACT THAT IT WAS NEVER GRANTED PARTIAL LEVY RELIEF IIN CONNECTION WITH ITS REDUCED PRODUCTION IN THE SECOND QUARTER OF 1975, RESULTING FROM THE COOLING TOWER COLLAPSE, ALTHOUGH PRODUCTION AT SCOTTSBORO WAS ALSO REDUCED DURING THAT PERIOD. THERE IS NOTHING TO INDICATE THAT AFTER THE SHUTDOWN THE GOVERNMENT OF JAMAICA WAS WILLING TO GRANT ANY LEVY RELIEF TO REVERE.

OF COURSE, REVERE ARGUES THAT IMPOSITION OF THE BAUXITE LEVY WAS A VIOLATION OF THE CONCESSION AGREEMENT AND COMPENSABLE UNDER ITS OPIC INSURANCE. BUT ITS CHILLED INVESTMENT CLIMATE THEORY, IF ACCEPTED, CAN BE SUSTAINED REGARDLESS OF THE LEGALITY OR ILLEGALITY OF THE TAX SINCE IT IS GROUNDED ON ABUSE OF DISCRETION IN THE APPLICATION OF THE TAX AS WELL AS ITS ALLEGED ILLEGALITY. MOREOVER, REVERE HAS ALWAYS FREELY ADMITTED THAT THE 220,000 TON FIRST STAGE OF CAPACITY WAS NEVER OPERATED ON A FINANCIALLY VIABLE BASIS. AS TO THE POINTS MADE BY MINISTER THOMPSON IN HIS MAY 4 LETTER TO MARSHALL MAYS IN THAT REGARD, REVERE WILL ARGUE THAT THEY ARE IRRELEVANT SINCE ITS CASE IS PREDICATED PRIMARILY ON ACTIONS OF THE GOVERNMENT OF JAMAICA WHICH ALLEGEDLY PREVENTED EXPANSION OF THE FACILITY INTO A FINANCIALLY VIABLE OPERATION. AS EXPANSION HAD BEEN CONTEMPLATED FROM THE FIRST, AS EVIDENCED BY THE

CONCESSION AGREEMENT, THIS LINE OF REASONING IS SAID TO
UNCLASSIFIED

PAGE 09 STATE 107803

HAVE ADDED FORCE.

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

CONCERNING THE EFFECT OF THE BAUXITE LEVY, WE ANTICIPATE
THAT REVERE WILL PRODUCE REPORTS SHOWING THE LEVY TO HAVE
RENDERED THE OPERATIONS OF OTHER JAMAICAN PRODUCERS TO BE
MARGINALLY PROFITABLE AT BEST WHEN COSTS ARE COMPARED WITH
WORLD MARKET PRICES. REVERE MAY ATTEMPT TO GIVE IMPORTANCE
TO STATEMENTS SUCH AS THAT MADE BY FINANCE MINISTER COORE
IN THE APRIL 17, 1977 JAMAICAN DAILY NEWS THAT JAMAICA
IS IN DANGER OF PRICING ITSELF OUT OF THE MARKET BECAUSE
OF THE BAUXITE LEVY AND HIGH WAGES.

ALSO, REVERE WILL PROBABLY UTILIZE THE OPINIONS EXPRESSED
BY DR. DAVIS CONCERNING THE "SPECTACULAR" AND "DRAMATIC"
ACHIEVEMENTS OF REVERE AS EVIDENCE SUPPORTING THE CONTEN-
TION THAT THE TECHNOLOGICAL PROBLEMS WERE SOLVED AND THAT
REVERE HAD MADE IMPORTANT BREAK-THROUGHS IN THE PROCESSING
OF AN ORE WHICH NO OTHER COMPANY COULD WORK. THE ACTIONS
OF JAMAICA, IT IS ASSERTED, THEN PREVENTED REVERE FROM
CAPITALIZING ON ITS ACHIEVEMENTS. I REPEAT THAT THIS
ARGUMENT IS GROUNDED PRIMARILY ON ACTS OF THE GOVERNMENT
OF JAMAICA SUBSEQUENT TO THE SHUTDOWN WHICH ARE SAID TO BE
ILLEGAL AND HOSTILE TO REVERE AND TO HAVE EFFECTIVELY PRE-
VENTED REVERE FROM RAISING CAPITAL NECESSARY FOR A LATER
EXPANSION.

IN CONNECTION WITH ITS ABUSE OF DISCRETION THEORY, REVERE
WILL ALSO ASSERT THAT AN APPLICATION OF THE BAUXITE LEVY
TO REVERE ON THE SAME FORMULA BASIS AS APPLIED TO THE
OTHER COMPANIES IS IN ITSELF AN IMPROPER EXERCISE OF DIS-
CRETION, SINCE THE QUALITY OF ORE WHICH REVERE MUST PRO-
CESS ENTAILS A HIGHER COST THAN THAT WHICH THE OTHER
COMPANIES MUST INCUR. ACCORDINGLY, REVERE WILL CONTEND
THAT IT IS ENTITLED TO LESSER BAUXITE LEVY CHARGES.

REVERE FURTHER CONTENDS THAT IMPOSITION OF THE LEVY ON A
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DEEMED MINIMUM TONNAGE, REGARDLESS OF ACTUAL PRODUCTION,
HAS THE PRACTICAL EFFECT OF REMOVING THE USUAL PREROGATIVE
WHICH A PRODUCER MUST HAVE, ACCORDING TO REVERE, TO
OPERATE ITS PROJECT ON A REASONABLE COMMERCIAL BASIS.
THIS IS ANOTHER FACTOR WHICH REVERSIBLE FOR REVERLED TEX-
INVESTMENT CLIMATE MAKING IT IMPOSSIBLE FOR REVERE TO EX-
PAND THE FACILITY.

I HOPE THIS LETTER AND OUR PREVIOUS CONVERSATION AFFORD
YOU A BETTER UNDERSTANDING OF THE VERY SERIOUS CASE WHICH
REVERE WILL PRESENT AGAINST OPIC. I BELIEVE IT IS AP-
PARENT FROM THE COMMENTS MADE BY MINISTER THOMPSON AND

OTHER JAMAICAN OFFICIALS THAT THERE HAS BEEN SOME
MISPERCEPTION OF THE BASIS OF REVERE'S CLAIM. THIS IS
UNDERSTANDABLE, SINCE THE CLAIM IS QUITE DIFFERENT FROM

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

THAT RAISED IN REVERE'S JAMAICAN LITIGATION. NEITHER THE ASSERTIONS THAT REVERE'S FIRST STAGE WAS NOT COMMERCIALLY VIABLE NOR THE FACT THAT THE GOVERNMENT OF JAMAICA HAS APPROPRIATED NONE OF REVERE'S ASSETS TO ITS OWN USE UNDERMINES REVERE'S PRINCIPAL THEORY.

THANK YOU AGAIN FOR YOUR VERY KIND COOPERATION. WE MAY WISH TO CONTACT YOU AGAIN SHORTLY WITH ADDITIONAL REQUESTS FOR INFORMATION.

SINCERELY,
RICHARD STERN
SENIOR COUNSEL FOR CLAIMS

CC: SENATOR DUDLEY THOMPSON
MINISTER OF MINING AND NATURAL RESOURCES

THE HONORABLE ALFRED A. RATTRAY
AMBASSADOR TO THE UNITED STATES

UNCLASSIFIED

PAGE 11 STATE 107803

MR. JOHN DORRANCE
CHARGE
EMBASSY OF THE UNITED STATES. UNQUOTE. CHRISTOPHER

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Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009

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Margaret P. Grafeld
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US Department of State
EO Systematic Review
22 May 2009
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